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No. 99-142

In the Supreme Court of the United States

HYUNDAI MERCHANT MARINE COMPANY, LTD., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Oil Pollution Act of 1990, 33 U.S.C. 2701 *et seq.*, authorizes the United States to recover monitoring and other costs incurred by the Coast Guard to prevent catastrophic damage to the environment threatened as a result of the grounding of petitioners' vessel.

2. Whether petitioners' due process rights were violated because they did not receive a hearing about whether the Coast Guard's costs were "prudent, or necessary, or reasonable."

3. Whether the court of appeals correctly determined that the Oil Pollution Act authorizes an award of attorney's fees in this action.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Atlantic Richfield Co. v. *American Airlines, Inc.*, 98 F.3d 564 (10th Cir. 1996)	7
California v. *Celtor Chem. Corp.*, 901 F. Supp. 1481 (N.D. Cal. 1995)	7
California Dep't of Toxic Substances Control v. *SnyderGeneral Corp.*, 876 F. Supp. 222 (E.D. Cal. 1994)	7
Commonwealth of Puerto Rico v. *SS ZOE COLOCOTRONI*, 456 F. Supp. 1327 (D.P.R. 1978), aff'd in part, vacated in part on other grounds, 628 F.2d 652 (1st Cir. 1980), cert. denied, 450 U.S. 912 (1981)	13
Concrete Pipe & Products of California, Inc. v. *Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993)	10, 11
Freeport Sulphur Co. v. *S.S. HERMOSA*, 526 F.3d 300 (5th Cir. 1976)	13
National Cable Television Ass'n v. *United States*, 415 U.S. 336 (1974)	5, 6
New York v. *Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985)	7
Pneumo Abex Corp. v. *Bessemer and Lake Erie R.R.*, 936 F. Supp. 1250 (E.D. Va. 1996)	7
Town of New Windsor v. *Tesa Tuck, Inc.*, 935 F. Supp. 317 (S.D.N.Y. 1996)	7

Cases—Continued: Page

Union Petroleum Corp. v. *United States*, 651 F.2d 734 (Ct. Ct. 1981) 13
United States v. *American Cyanamid Co.*, 786 F. Supp. 152 (D.R.I. 1992) 13
United States v. *Hardage*, 750 F. Supp. 1460 (W.D. Okla. 1990), cert. denied, 510 U.S. 913 (1993) 13
United States v. *Hollywood Marine*, 519 F. Supp. 688 (S.D. Tex. 1981) 13
United States v. *Lowe*, 118 F.3d 399 (5th Cir. 1997) 7
United States v. *MORANIA BARGE 200*, 1983 Amer. Maritime Cases 2761 (E.D.N.C. 1982) 13
United States v. *Rohm and Haas Co.*, 2 F.3d 1265 (3d Cir. 1993) 7, 8, 9
United States v. *R.W. Meyer, Inc.*, 889 F.2d 1497 (6th Cir. 1989), cert. denied, 494 U.S. 1057 (1990) 13
United States v. *Slade, Inc.*, 447 F. Supp. 638 (E.D. Tex. 1978) 13
Youakim v. *Miller*, 425 U.S. 231 (1976) 10

Statutes:

Act of Oct. 19, 1996, Pub. L. No. 104-324, Tit. XI, § 1142(d), 110 Stat. 3991 (33 U.S.C. 2715(c) (Supp. III 1997)) 13-14
Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. 9607 (1988) 7
Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*:
§ 311, 33 U.S.C. 1321 (1994 & Supp. III 1997) 12
§ 311(c), 33 U.S.C. 1321(c) (1994 & Supp. III 1997) 2
§ 311(c)(1)(B)(i), 33 U.S.C. 1321(c)(1)(B)(i) 2
§ 311(c)(1)(B)(ii), 33 U.S.C. 1321(c)(1)(B)(ii) 2, 12

Statutes—Continued: Page

Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 11
Oil Pollution Act of 1990, 33 U.S.C. 2701 *et seq.* 1
§ 1001(31), 33 U.S.C. 2701(31) 2
§ 1002(a), 33 U.S.C. 2702(a) 2, 7, 11, 12
§ 1002(b), 33 U.S.C. 2702(b) 12
§ 1002(b)(1)(A), 33 U.S.C. 2702(b)(1)(A) 2, 12
§ 1015, 33 U.S.C. 2715 5
29 U.S.C. 1401(c) 11

Miscellaneous:

David A. Bagwell, *Hazardous and Noxious Substances*, 62 Tul. L. Rev. 433 (1988) 13
S. Rep. No. 94, 101st Cong., 2d Sess. (1990) 13

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 172 F.3d 1187. The findings of fact and conclusions of law of the district court (Pet. App. 39-71) are reported at 1997 Amer. Maritime Cases 2333.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1999. The petition for a writ of certiorari was filed on July 19, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Oil Pollution Act of 1990 (OPA or Act), 33 U.S.C. 2701 *et seq.*, to place the costs

of oil pollution upon those "responsible * * * for a vessel * * * from which oil is discharged, or which poses the substantial threat of a discharge of oil" into United States waters. 33 U.S.C. 2702(a). Section 1002(b)(1)(A) of the Act, 33 U.S.C. 2702(b)(1)(A), makes those responsible for threatened or actual pollution liable for the "removal costs and damages" incurred by the United States in carrying out certain of its obligations under Section 311(c) of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. 1321(c) (1994 & Supp. III 1997). The Act defines removal costs to include "the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident." 33 U.S.C. 2701(31). The activities under the FWPCA for which such removal costs must be paid include, among other things, "mitigat[ing] or prevent[ing] a substantial threat of a discharge * * * [and] direct[ing] or monitor[ing] all Federal, State, and private actions to remove a discharge." 33 U.S.C. 1321(c)(1)(B)(i) and (ii).

2. On September 24, 1991, petitioners' vessel, the *Hyundai*, left Portland, Oregon, with a cargo of 24,000 tons of grain. The *Hyundai*'s fuel tanks were located in the very bottom of the vessel beneath the cargo holds and carried 200,000 gallons of a type of heavy fuel oil particularly dangerous to the environment. Pet. App. 41-42.

On October 2, 1991, petitioners' vessel ran aground in the Shumagin Islands of Alaska, a part of the Alaska Maritime National Wildlife Refuge and an area "of great environmental sensitivity." Pet. App. 42. Soon after the ship ran aground, at least three forward ballast tanks and one fuel tank ruptured, and "there

was a very great risk of serious environmental damage." *Id.* at 44. The *Hyundai*'s owners and insurers "assumed responsibility for the salvage and any necessary cleanup." *Id.* at 48. Nevertheless, for the first eight days of the pollution threat, the *Hyundai*'s owners and insurers had "no vessel on scene capable of dealing with a catastrophic situation." *Ibid.* At no time did the *Hyundai*'s owners have equipment in place sufficient to "manage[] both a break-up of [the *Hyundai*] and a spill of fuel in a storm." *Id.* at 50. The salvage operation planned by the *Hyundai*'s owners involved the use of grain evacuators to lighten the ship so that it could be refloated, but such devices sufficient to the task did not arrive on the scene until October 11, 1991, fully ten days after the vessel ran aground. *Id.* at 51-52. On October 12, 1991, the pollution threat finally abated when the *Hyundai* was refloated and towed to a temporary anchorage for repairs. *Id.* at 53.

The Coast Guard responded immediately to the *Hyundai*'s grounding, with the first vessel and helicopter arriving within hours. Pet. App. 43. The Coast Guard deployed additional ships and aircraft and, by October 5, 1991, had put in place specialized oil spill recovery equipment sufficient to deal with a serious oil spill. *Id.* at 47. The threat of a serious spill was substantial. The *Hyundai* was perched upon rocks and, on the fifth and sixth days after the grounding, a gale force Gulf of Alaska storm twisted and swung the ship 105 degrees around the rocks, causing additional damage to the *Hyundai*'s hull and an oil leakage visible in a sheen over 2000 feet long. *Id.* at 3, 51. There was "at all times a moderate risk that the [*Hyundai*] would break up." *Id.* at 47. Accordingly, to defend against this serious threat, the Coast Guard kept its equipment in place until efforts to refloat the *Hyundai* on October

12 were successful. Given the threat of an oil spill that could not have been contained by the *Hyundai*'s owners, the district court concluded that "it would have been irresponsible for the Coast Guard not to have undertaken the actions which it took, even though the owners and insurers assumed responsibility for the incident." *Id.* at 48-49.[1] The cost to the Coast Guard for maintaining its oil spill equipment at the scene until the threat of a major spill abated was $1.1 million. *Id.* at 70.

The United States brought this action to recover its costs pursuant to the OPA. The district court made findings of all relevant facts and conclusions of law. Pet. App. 39-71. The court noted that "the parties agree with the general proposition that the arbitrary and capricious standard be used to evaluate the [Coast Guard's] decisions." *Id.* at 35. The court thus concluded that the OPA authorized the recovery of removal costs from a responsible party if the costs were rationally incurred. *Ibid.* The court then reviewed *de novo* the actions taken by the Coast Guard and held that the claimed costs were "neither arbitrary nor capricious, and, under the extreme and sensitive circumstances of this * * * [incident], were also reasonable and necessary costs." *Id.* at 62. It calculated the government's removal costs as $1,109,963, and awarded the government that sum plus interest. *Id.* at 70. In addition, the court awarded the government approximately $104,000 in attorney's fees. *Id.* at 72.

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[1] A Coast Guard cutter accompanied the *Hyundai* to its temporary anchorage, where it was learned that there were a "total of 133 cracks in the hull of the vessel, one of which was 6 feet wide and 42 feet long." Pet. App. 53.

3. The court of appeals affirmed. Petitioners argued that the OPA authorized only the recovery of costs actually incurred in removing oil from the water. The court of appeals noted that "Hyundai's emphasis on actual removal unduly minimizes the importance of the Coast Guard's emergency stand-by operation, which qualifies as an act of 'prevention,' the cost of which is clearly recoverable under the terms of the definition [of 'removal costs'] as it applies to the liability imposed by § 2702 [of the OPA]." Pet. App. 7. Petitioners also challenged the assessment of what it termed "monitoring costs," relying on *National Cable Television Ass'n* v. *United States*, 415 U.S. 336 (1974) (*NCTA*). However, the court of appeals noted that this Court's decision in *NCTA* was not apposite, because *NCTA* "reminded Congress that it may not delegate away its taxing power to an executive agency * * * [but] [t]he OPA authorizes recovery of costs, not taxation." Pet. App. 7-8 (internal citations omitted). Finally, the court of appeals rejected petitioners' claim that attorney's fees are not warranted under the OPA. The court of appeals noted that 33 U.S.C. 2715 authorizes the payment of attorney's fees to the United States in actions brought to recover the payment of removal costs in these circumstances.

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. Petitioners assert that a conflict exists among the circuits on the application of this Court's decision in *National Cable Television Ass'n* v. *United States*, 415 U.S. 336 (1974). They contend that *NCTA* states a rule of general applicability concerning when a regulatory

statute should be construed to permit an agency to recover certain operating costs from a party, and that the Third and Ninth Circuits have applied *NCTA* in conflicting ways to "costs incurred by the Government in monitoring environmental response operations." Pet. 7. Those contentions are without merit. To manufacture a conflict, petitioners misinterpret *NCTA* and overlook important distinctions between the costs at issue in the Third and Ninth Circuit decisions.

NCTA concerned "fees" that the Federal Communications Commission (FCC) imposed upon all cable television licensees. This Court held that the term "fee" implies a notion of a benefit conferred, and it concluded that a "fee" calculated to reimburse the FCC for all of its operating expenses for the regulation of cable television, rather than to pay for value received by the regulated party, was in the nature of a tax, not a "fee." To avoid the necessity to decide the constitutional question of the adequacy of such a delegation of the taxing power, the Court read the statute narrowly, as not having delegated Congress's taxing authority to the agency, and remanded to the FCC for reconsideration of the fee. See 415 U.S. at 343.

The court of appeals correctly rejected petitioners' contention that *NCTA* controls this case, holding that *NCTA* does not apply because the OPA "authorizes recovery of costs, not taxation." Pet. App. 8. The district court carefully determined the actual costs incurred by the Coast Guard and correctly concluded that the plain language of OPA requires "each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil" to be "liable for the removal costs and damages specified in subsection (b) that result from

such incident." Pet. App. 63 (quoting 33 U.S.C. 2702(a)).

Petitioners contend that a Third Circuit decision applying the *NCTA* doctrine to the government's "costs incurred in overseeing a private removal [of pollution] under * * * CERCLA [the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9607 (1988)]" conflicts with the decision below. See Pet. 6 (citing *United States* v. *Rohm and Haas Co.*, 2 F.3d 1265 (3d Cir. 1993)). That contention is incorrect. First, *Rohm and Haas* arose under a different statute from OPA, with different statutory mechanisms and requirements for the recovery of governmental costs.[2] Second, it is doubtful whether, even under *Rohm and Haas*, the Third Circuit would have decided this case differently. *Rohm and Haas* concerned "costs incurred by the government in monitoring private parties' compliance with their legal obligations." 2 F.3d at 1273. The *Rohm and Haas* defendants had spent 15 years cleaning up a hazardous waste site pursuant to an order by the Environmental

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[2] Even within the context of CERCLA, the Third Circuit's *Rohm and Haas* decision has been widely rejected by courts that subsequently have considered the issue. See, *e.g.*, *United States* v. *Lowe*, 118 F.3d 399, 401 n.2 (5th Cir. 1997) (*Rohm*'s reliance on *NCTA* "represented a significant departure from prior case law"); *Atlantic Richfield Co.* v. *American Airlines, Inc.*, 98 F.3d 564, 567 (10th Cir. 1996); *Pneumo Abex Corp.* v. *Bessemer & Lake Erie R.R.*, 936 F. Supp. 1250, 1261-1262 (E.D. Va. 1996); *Town of New Windsor* v. *Tesa Tuck, Inc.*, 935 F. Supp. 317, 324-327 (S.D.N.Y. 1996); *California* v. *Celtor Chem. Corp.*, 901 F. Supp. 1481, 1489-1490 (N.D. Cal. 1995); *California Dep't of Toxic Substances Control* v. *SnyderGeneral Corp.*, 876 F. Supp. 222, 225 (E.D. Cal. 1994). See also *New York* v. *Shore Realty*, 759 F.2d 1032, 1043 (2d Cir. 1985) (holding that remand costs of the type rejected by *Rohm and Haas* court could be recovered under CERCLA).

Protection Agency (EPA) made under its CERCLA authority. *Id.* at 1268. The EPA oversaw the post-spill clean-up efforts and subsequently sought reimbursement for its oversight costs, relying upon a CERCLA provision that allowed recovery of "removal costs" it incurred. Unlike the monitoring and cleanup costs at issue here, which were directed at prevention and mitigation of a potential disaster in the making, the actual release of pollutants in *Rohm and Haas* had long since passed when the contested post-spill monitoring and oversight costs were incurred.

In construing the CERCLA provisions relating to the EPA's post-spill administrative oversight costs, the Third Circuit invoked *NCTA*, concluding that an agency's imposition of costs for the oversight of a polluter's post-spill clean-up was in the nature of a tax. Relying upon *NCTA* for the proposition that statutes imposing tax-like obligations must be construed narrowly, the court interpreted the specific CERCLA provisions not to include the types of administrative and oversight costs at issue there. The court, however, was careful to distinguish from its holding the kinds of removal costs at issue in this case, noting that CERCLA authorizes recovery of removal costs for "actual monitoring of a release or threat of release." 2 F.3d at 1275. As the court further explained:

> To assist the district court in carrying out this task, we conclude our discussion regarding oversight costs by further elucidating what we perceive to be the statutory distinction between recoverable and non-recoverable costs. Where the government takes direct action to investigate, evaluate, or monitor a release, threat of release, or a danger posed by such a problem, the activity is a "removal" and its

> costs are recoverable. *See* 42 U.S.C. § 9604(b) (1988). This includes the costs, no matter at what stage incurred, of ascertaining whether and to what extent the risk has been reduced or eliminated by the chosen response. Similarly, if the activity is intended to enable EPA to formulate a position on what would be the most appropriate response action at a given facility, the cost is recoverable.

Id. at 1278.

Because this case concerns costs incurred in the Coast Guard's monitoring of the ongoing substantial threat of a major spill from a vessel still in danger of breaking up, there is no reason to suppose that the *Rohm and Haas* court would have decided this case differently than did the court below. As the district court noted, for the first eight days of the incident the petitioners had no credible pollution response vessels on scene. On day nine petitioners' salvage tug finally arrived; on day eleven the grain cargo evacuators began their work of lightening the vessel's load; and only on day twelve, October 12th, was the *Hyundai* floated off the rocks and the pollution threat substantially lessened. See pp. 2-4, *supra*.

During that period the Coast Guard vessels, equipment, aircraft, and personnel were on the scene and incurring the monitoring costs at issue. As the district court found, the possibility that the *Hyundai* would break up and cause a massive spill during that period posed a "real, significant risk." Pet. App. 52. Therefore, the Coast Guard was guarding against the continued threat of a pollutant release, not merely monitoring post-spill clean-up activities, as in *Rohm and Haas*.

2. Petitioners argue that they were deprived of due process by the manner in which the Coast Guard sought

to recover its removal costs. Petitioners complain that they had no opportunity for administrative review of the Coast Guard's decisions, with review available only in the district court. Pet. 10. Petitioners then assert:

> Because [petitioners] had no prior opportunity to challenge the Coast Guard's cost bill * * * the application of the arbitrary and capricious standard by the District court without regard to whether the costs were necessary, deprived [petitioners] of meaningful review * * *.
>
> * * * Deferring to the [Coast Guard's] decisions by applying the arbitrary and capricious standard during that initial review [by the district court] deprives the responsible party of meaningful review.

Pet. 10-11. Petitioners did not raise that issue in the courts below.[3] Indeed, the district court found that "the parties agree with the general proposition that the arbitrary and capricious standard be used to evaluate the [cost] decisions." Pet. App. 35. That issue therefore is not properly before this Court. See, *e.g.*, *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976).

Second, petitioners invoke this Court's decision in *Concrete Pipe and Products of California, Inc.* v. *Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993), for the proposition that "an agency action that is essentially non-adjudicative in character cannot, as a constitutional matter, be afforded deference during the initial review by a neutral adju-

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[3] Petitioners state that they did argue this issue to the Ninth Circuit, Pet. 11 n.3, but provide no citation to any part of their briefs that raised this issue, nor are we aware of any.

dicator." Pet. 12.[4] Petitioners in fact received full, *de novo* review in the district court. In making its factual findings, the district court "appl[ied] the preponderance of the evidence rule as to the party (the United States) having the burden of proof." Pet App. 44 n.4. The district court made extensive, well reasoned findings on all relevant facts. *Id.* at 39-62. The court then determined *de novo* whether the actions found as a fact to have occurred were rationally taken by the Coast Guard. *Id.* at 62. The court expressly found that the Coast Guard's actions and costs were neither arbitrary nor capricious and, "under the extreme and sensitive circumstances of this [marine environment pollution] project, were also reasonable and necessary costs." *Ibid.*

Petitioners' contention that they are entitled to review of whether any particular cost is "prudent, or necessary" (Pet. 10) finds no support in the text of the OPA, which contains no such limitation. See 33 U.S.C. 2702(a). The court of appeals thus correctly held that OPA "does not authorize the imposition of any higher standard" than whether the recovery of removal costs sought by the United States is "arbitrary or capricious." Pet. App. 10.

3. Petitioners contend that the courts below erred in allowing for the recovery of monitoring costs, "base costs," and attorney's fees. Pet. 13-16. The court of

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[4] In *Concrete Pipe*, this Court held that provisions of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208, do not violate due process through judicial review of an arbitrator's determinations when in such judicial review "there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." 508 U.S. at 611 (quoting 29 U.S.C. 1401(c)).

appeals properly decided those issues under the OPA, and no other court of appeals has addressed them.

First, with respect to monitoring costs, Congress provided in OPA Section 2702(a) that persons whose vessels discharge or "which pose[] the substantial threat of a discharge of oil" are liable for "all removal costs incurred by the United States." 33 U.S.C. 2702(b)(1)(A). In Section 2702(b), Congress provided for recovery of "all removal costs incurred by the United States * * * under subsection (c), (d), (e), or (*l*) of [the FWPA, 33 U.S.C. 1321]." 33 U.S.C. 2702(b)(1)(A). Under the FWPCA, in turn, the United States may recover costs for "monitor[ing] all Federal, State, and private actions to remove a discharge." 33 U.S.C. 1321(c)(1)(B)(ii). See Pet. App. 4-7. OPA thus specifically included monitoring within the scope of recoverable removal activities, and the court of appeals concluded that the Coast Guard's monitoring of the *Hyundai* was undertaken as part of "its effort to prevent or minimize a threatened oil discharge." *Id.* at 7.

Second, with regard to base costs, the court of appeals noted that "[t]he fact that, if this near-disaster had not occurred, the personnel would have been paid to perform some other task does not alter the reality that the mishap did occur and [the] Coast Guard personnel were paid to monitor a potential spill." Pet. App. 10-11. The court then noted that "[b]ase costs represent real costs to the United States and are recoverable to the extent they are allocable to a response to an oil spill." *Id.* at 11. The court's conclusion is consistent with the FWPCA case law used by Congress

as the foundation of the OPA,[5] as well as consistent with case law under other environmental statutes and the general maritime law, all of which allow recovery of base costs and administrative costs and overhead allocable to the event.[6]

Finally, petitioners claim that attorney's fees are not properly awarded here because, they contend, this is not an action to recover removal costs paid from the Oil Spill Liability Trust Fund, as required by 33 U.S.C.

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[5] Congress expressly looked to the case law under the FWPCA (also referred to as the Clean Water Act) as the framework for the OPA. See S. Rep. No. 94, 101st Cong., 2d Sess. 10-12 (1990). Under the FWPCA, the United States' recovery is not conditioned upon any proof of "necessity" or even "reasonableness." See, *e.g.*, *Commonwealth of Puerto Rico* v. *SS ZOE COLOCOTRONI*, 456 F.Supp. 1327, 1347 (D.P.R. 1978) (recovery is "measured by the Government's actual costs regardless of their reasonableness"), aff'd in part, vacated in part on other grounds, 628 F.2d 652 (1st Cir. 1980), cert. denied, 450 U.S. 912 (1981). Under the FWPCA, administrative and overhead costs are recoverable. See, *e.g.*, *United States* v. *MORANIA BARGE 200*, 1983 Amer. Maritime Cases 2761, 2764 (E.D.N.C. 1982) (FWPCA costs include Coast Guard internal costs for personnel, material, equipment, supplies, overhead, and other internal costs); *United States* v. *Slade, Inc.*, 447 F. Supp. 638 (E.D. Tex. 1978); *United States* v. *Hollywood Marine, Inc.*, 519 F.Supp. 688, 692 (S.D. Tex. 1981); David A. Bagwell, *Hazardous and Noxious Substances*, 62 Tul. L.Rev. 433, 443 (1988). See also *Union Petroleum Corp.* v. *United States*, 651 F.2d 734, 744 (Ct. Cl. 1981) (holding polluter liable for government's costs).

[6] See, *e.g.*, *United States* v. *R.W. Meyer, Inc.*, 889 F.2d 1497, 1502-1504 (6th Cir. 1989), cert. denied, 494 U.S. 1057 (1990) (CERCLA); *United States* v. *American Cyanamid Co.*, 786 F. Supp. 152, 156 (D.R.I. 1992) (same); *United States* v. *Hardage*, 750 F. Supp. 1460, 1504 (W.D. Okla. 1990) (same), cert. denied, 510 U.S. 913 (1993). See also *Freeport Sulphur Co.* v. *S.S. HERMOSA*, 526 F.2d 300, 303-304 (5th Cir. 1976) (general maritime law).

2715(c) (Supp. III 1997). Petitioners concede, however, that the recovery of funds in this case will be paid into the Oil Spill Liability Trust Fund. Pet. App. 12. Accordingly, as the court of appeals noted, any argument based upon the "happenstance that, as a matter of accounting, the Fund paid for the removal costs after, rather than before, the claim against the responsible party was litigated," would defeat the purposes of the OPA by elevating form over substance. *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1999